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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD TUSO, on behalf of
himself and others similarly
situated,

Plaintiff,

v.

NATIONAL HEALTH AGENTS, LLC, a
Florida company, et al.,

Defendants.

No. 2:20-cv-02130-JAM-CKD

**ORDER GRANTING FCL AND SITA'S
MOTION TO DISMISS AND DENYING IN
PART AND GRANTING IN PART IBA
AND NHA'S MOTION TO DISMISS**

Plaintiff Richard Tusso brings this putative class action under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. First Amended Complaint ("FAC") ¶ 7, ECF No. 36. Defendants are: National Health Agents, LLC ("NHA") and Interstate Brokers of America, LLC ("IBA"), two Florida companies that place telemarketing calls selling the insurance services and supplemental health plans of other companies; Service Industry Trade Alliance ("SITA"), a membership-based organization that provides consumers with discounted health plans; and First Continental Life & Accident Insurance Company, Inc. ("FCL"), a

1 provider of supplemental insurance products. Id. ¶¶ 2-5, 22, 31,
2 35. Plaintiff alleges that IBA and NHA place telemarketing calls
3 on behalf of FCL and SITA. FAC ¶¶ 37,40.

4 Before the Court are two Motions to Dismiss.¹ Mot. to
5 Dismiss by FCL and SITA ("FCL/SITA Mot."), ECF No. 39; Mot. to
6 Dismiss by IBA and NHA ("IBA/NHA Mot."), ECF No. 40. Plaintiff
7 opposed these motions. Opp'n by Tusco to FCL/SITA Mot. ("FCL/SITA
8 Opp'n"), ECF No. 41; Opp'n by Tusco to IBA/NHA Mot. ("IBA/NHA
9 Opp'n"), ECF No. 42. Defendants replied. Reply by FCL and SITA
10 ("FCL/SITA Reply"), ECF No. 43; Reply by IBA and NHA ("IBA/NHA
11 Reply"), ECF No. 44.

12 After consideration of the parties' briefing on the motions
13 and relevant legal authority, the Court GRANTS FCL and SITA's
14 Motion to Dismiss and DENIES IN PART and GRANTS IN PART IBA and
15 NHA's Motion to Dismiss.

16 I. FACTUAL ALLEGATIONS

17 The parties are familiar with the factual background of this
18 case—it is set forth extensively in the amended complaint, the
19 parties' briefings, and the Court's prior order. See Order, ECF
20 No. 35. The Court also highlights material allegations
21 throughout this decision. The Court therefore does not restate
22 those allegations here.

23 II. OPINION

24 A. Legal Standard

25 A Rule 12(b)(1) motion to dismiss tests whether a complaint
26 alleges grounds for federal subject-matter jurisdiction. See

27 ¹ These motions were determined to be suitable for decision
28 without oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for May 18, 2021.

1 Fed. R. Civ. P. 12(b)(1). Once a party has moved to dismiss for
2 lack of subject-matter jurisdiction under Rule 12(b)(1), the
3 opposing party bears the burden of establishing the court's
4 jurisdiction. See Kokkonen v. Guardian Life Ins. Co., 511 U.S.
5 375, 377 (1994).

6 A Rule 12(b)(6) motion challenges the complaint as not
7 alleging sufficient facts to state a claim for relief. See Fed.
8 R. Civ. P. 12(b)(6). "To survive a motion to dismiss [under
9 12(b)(6)], a complaint must contain sufficient factual matter,
10 accepted as true, to state a claim for relief that is plausible
11 on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
12 (internal quotation marks and citation omitted). While
13 "detailed factual allegations" are unnecessary, the complaint
14 must allege more than "[t]hreadbare recitals of the elements of
15 a cause of action, supported by mere conclusory statements."
16 Id. In considering a motion to dismiss for failure to state a
17 claim, the court generally accepts as true the allegations in
18 the complaint, construes the pleading in the light most
19 favorable to the party opposing the motion, and resolves all
20 doubts in the pleader's favor. Lazy Y Ranch LTD. v. Behrens,
21 546 F.3d 580, 588 (9th Cir. 2008). "In sum, for a complaint to
22 survive a motion to dismiss, the non-conclusory 'factual
23 content,' and reasonable inferences from that content, must be
24 plausibly suggestive of a claim entitling the plaintiff to
25 relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir.
26 2009).

27 B. Analysis: FCL and SITA's Motion

28 In their Motion, Defendants FCL and SITA argue Plaintiff has

1 not stated a plausible TCPA claim as to FCL and SITA because
2 Plaintiff has failed to allege an agency relationship between FCL
3 and SITA on the one hand and IBA and NHA on the other. FCL/SITA
4 Mot. at 5-8. As an initial matter, it is undisputed that IBA and
5 NHA, not FCL and SITA, actually placed the calls to Plaintiff now
6 at issue. FCL/SITA Mot. at 3; FCL/SITA Opp'n at 4. Thus,
7 Plaintiff is not asserting any direct liability claim against FCL
8 and SITA; rather, he is alleging FCL and SITA are vicariously
9 liable for IBA and NHA's actions which he claims violated the
10 TCPA. FCL/SITA Opp'n at 1, 4.

11 "[A] defendant may be held vicariously liable for TCPA
12 violations where the plaintiff establishes an agency
13 relationship, as defined by federal common law, between the
14 defendant and a third-party caller." Gomez v. Campbell-Ewald
15 Co., 768 F.3d 871, 879 (9th Cir. 2014); see also Henderson v.
16 United Student Aid Funds, Inc., 918 F.3d 1068, 1072 (9th Cir.
17 2019). "Agency is the fiduciary relationship that arises when
18 one person (a 'principal') manifests assent to another person (an
19 'agent') that the agent shall act on the principal's behalf and
20 subject to the principal's control, and the agent manifests
21 assent or otherwise consents so to act." Henderson, 918 F.3d at
22 1073 (internal citation omitted). In determining whether an
23 agency relationship exists, a key factor is the degree of control
24 exercised by the principal over the agent: for an agency
25 relationship to exist, the principal "must have a right to
26 control the actions of the agent." Naiman v. TranzVia LLC, No.
27 17-cv-4813-PJH, 2017 WL 5992123 at *6 (N.D. Cal. Dec. 4, 2017)
28 (internal citations omitted). Additionally, "agency can be

1 established expressly, via a showing of actual authority, or it
2 can be inferred, by finding apparent authority or
3 ratification.” Id. at *10 (internal citations omitted).

4 Here, Plaintiff contends he has sufficiently alleged an
5 agency relationship between FCL and SITA on the one hand and IBA
6 and NHA on the other, under all three theories: actual authority,
7 apparent authority, and ratification. FCL/SITA Opp’n at 4.

8 1. Actual Authority

9 To state a plausible claim under a theory of actual
10 authority, Plaintiff must allege facts showing that FCL and SITA
11 had the right to control IBA and NHA and the manner and means of
12 the calls IBA and NHA made. Naiman, 2017 WL 5992123 at *6
13 (internal citation omitted).

14 FCL and SITA contend Plaintiff’s failure to allege either
15 exercised control over IBA or NHA is fatal to their actual
16 authority theory. FCL/SITA Mot. at 6-7; FCL/SITA Reply at 2-3.
17 The Court agrees. Plaintiff has not alleged any facts indicating
18 FCL or SITA directed, instructed, or commanded IBA or NHA to
19 place the calls, let alone that either controlled the manner and
20 means of the calls IBA and NHA placed. See FAC. All Plaintiff
21 has alleged is that: (1) “SITA and First Continental rely on
22 companies such as IBA and NHA to engage in telemarketing on their
23 behalf in order to sell SITA memberships that also include First
24 Continental plans” and (2) “SITA and First Continental all
25 benefit financially from the health plans that are sold by
26 telemarketers such as NHA and Interstate Brokers.” FAC ¶¶ 37,
27 40; see also FCL/SITA Opp’n at 5 (referring the Court to
28 paragraph 37). From these bare conclusory allegations, the Court

1 cannot infer FCL and SITA had the right to control IBA and NHA.

2 Nor do the cases Plaintiff cites in opposition save his
3 claims based on actual authority. See FCL/SITA Opp'n at 5.
4 Specifically, Plaintiff cites to In re Jiffy Lube Int'l, Inc.,
5 Text Spam Litig., 847 F.Supp.2d 1253, 1258 (S.D. Cal. 2012) and
6 Kramer v. Autobytel, Inc., 759 F.Supp.2d 1165 (N.D. Cal. 2010) to
7 argue "courts have often found similar allegations sufficient to
8 show an agency relationship." Id. Neither case assists
9 Plaintiff. First, the plaintiffs in In re Jiffy Lube
10 specifically alleged that the principal directly "engaged" the
11 agent to conduct a marketing campaign and the principal "directed
12 the mass transmission of wireless spam to the cell phones
13 nationwide." 847 F. Supp. 2d at 1258. By contrast, here there
14 is no allegation that FCL or SITA "directed" any of IBA or NHA's
15 telemarketing actions. Thus, although the court in In re Jiffy
16 Lube did find vicarious liability had been sufficiently pled,
17 plaintiffs in that case alleged more than Plaintiff has here.

18 Kramer is even less helpful to Plaintiff's position because
19 the Kramer court did not address vicarious liability under the
20 TCPA whatsoever. See 759 F. Supp. 2d 1165. Because Kramer did
21 not address any of the vicarious liability pleading issues raised
22 by Defendants here, the Court agrees with FCL and SITA that
23 Kramer is inapposite. FCL/SITA Reply at 4.

24 For these reasons, Plaintiff fails to plausibly allege any
25 TCPA claim against FCL and SITA under an actual authority theory.

26 2. Apparent Authority

27 To state a plausible claim under an apparent authority
28 theory, Plaintiff must allege facts showing that FCL and SITA

1 "did or said something sufficient to create a reasonable belief"
2 that IBA and NHA had the authority to act on behalf of FCL and
3 SITA. Naiman, 2017 WL 5992123 at *7 (internal citations
4 omitted). Indeed, Plaintiff himself acknowledges that apparent
5 authority arises only "when a third-party reasonably believes
6 that the putative agent had authority to act on behalf of the
7 principal and that belief can be traced to the principal's own
8 manifestations." FCL/SITA Opp'n at 5 (citing to In re Fresh &
9 Process Potatoes Antitrust Litig., 834 F.Supp.2d 1141, 1167-68
10 (D. Idaho 2011))(emphasis added).

11 FCL and SITA contend that what's missing from the FAC is any
12 allegation that FCL or SITA manifested to Plaintiff that the
13 calls were being placed by IBA and NHA on their behalf. FCL/SITA
14 Mot. at 7; FCL/SITA Reply at 3. Indeed, they argue, there are no
15 allegations that Plaintiff interacted with FCL or SITA
16 whatsoever. FCL/SITA Reply at 3. Given the complete lack of
17 contact between Plaintiff and FCL and SITA, neither of these
18 Defendants could have manifested that the calls were being placed
19 at their behest. Id.

20 In opposition, Plaintiff fails to identify any manifestation
21 by SITA or FCL to support its apparent authority theory. See
22 FCL/SITA Opp'n. Plaintiff instead focuses only on IBA and NHA's
23 actions, contending: "NHA/IBA represent to consumers, including
24 Plaintiff, that they provide memberships on behalf of SITA and
25 health plan quotes on behalf of First Continental, which is
26 consistent with First Continental and SITA's business model.
27 These representations were confirmed when Plaintiff received an
28 email confirming the call describing the SITA membership and

1 First Continental Plan offered on the call, including the cost
2 for such membership and plan - which was to be paid directly to
3 First Continental - and attempting to bind First Continental and
4 SITA to a health plan and membership, respectively, with
5 Plaintiff. Ultimately, SITA and First Continental authorize
6 telemarketing to sell health plans on their behalf and accept the
7 benefits thereof." FCL/SITA Opp'n at 4. By pleading facts only
8 about the actions of the agents - IBA and NHA - as opposed to
9 those of the principals - FCL and SITA - Plaintiff fails to state
10 a claim based on apparent authority against FCL and SITA. See
11 Naiman, 2017 WL 5992123 at *7.

12 3. Ratification

13 To state a plausible claim under a ratification theory,
14 Plaintiff must allege facts showing that FCL and SITA knew that
15 IBA and NHA violated the TCPA and knowingly accepted the benefits
16 of those violations. Naiman, 2017 WL 5992123 at *13 (internal
17 citations omitted). That is, FCL and SITA cannot be bound by a
18 ratification made "without knowledge of material facts about the
19 agent's act." Id. at *7; see also Henderson, 918 F.3d at 1075
20 (explaining that principal must "know[] of the material facts
21 involved in the act it is ratifying.").

22 FCL and SITA identify two pleading deficiencies with
23 Plaintiff's ratification claim. FCL/SITA Mot. at 7-8; FCL/SITA
24 Reply at 3-4. First, Plaintiff has not alleged any facts showing
25 that either FCL or SITA had any knowledge of the calls at issue
26 let alone that the calls violated the TCPA. FCL/SITA Mot. at 7-
27 8. Second, Plaintiff has not alleged that FCL or SITA actually
28 benefitted from the calls at issue here. Id. at 8. As to SITA,

1 Plaintiff alleges SITA receives \$9 if a member joins. FAC
2 ¶¶ 33,75. But he does not allege he joined SITA or that SITA in
3 fact received \$9 here. See FAC. As to FCL, Plaintiff alleges
4 that FCL "benefits financially from the health plans that are
5 sold by telemarketers such as NHA and Interstate Brokers." Id.
6 ¶ 40. But Plaintiff does not allege he purchased a plan or that
7 FCL actually received any financial benefit here. See FAC.

8 In opposition, Plaintiff does not address these pleading
9 deficiencies. See FCL/SITA Opp'n. Instead, Plaintiff cites to a
10 string of caselaw for general ratification principles, see
11 FCL/SITA Opp'n at 6 (collecting cases), but does not apply these
12 principles to the allegations here. Accordingly, Plaintiff's
13 claims based on ratification also fail.

14 To summarize, because Plaintiff has not plausibly alleged an
15 agency relationship under any of the common law agency theories,
16 Plaintiff's vicarious liability claims against FCL and SITA fail.
17 FCL and SITA's Motion to Dismiss is therefore granted.

18 The Court further finds it appropriate to grant FCL and
19 SITA's Motion without leave to amend. See Deveraturda v. Globe
20 Aviation Sec. Servs., 454 F.3d 1043, 1046 (9th Cir. 2006)
21 (explaining courts need not grant leave to amend where amendment
22 would be futile). In opposition, Plaintiff had the opportunity
23 to proffer any additional facts that might convince the Court he
24 could plausibly allege an agency relationship between FCL and
25 SITA on the one hand and IBA and NHA on the other. He failed to
26 do so. Additionally, Plaintiff has already amended his
27 complaint. See FAC. Any further amendment would be futile.

28 C. Analysis: IBA and NHA's Motion

1 In their Motion, IBA and NHA advance two separate arguments
2 as to why Plaintiff's TCPA claims should be dismissed. See
3 generally IBA/NHA Mot. First, they argue the Court lacks
4 subject matter jurisdiction over the portions of Plaintiff's
5 claims concerning calls placed prior to July 6, 2020. IBA/NHA
6 Mot. at 3-7; IBA/NHA Reply at 4-5. Second, they argue Plaintiff
7 has not stated a plausible claim against NHA because Plaintiff
8 has failed to allege NHA and IBA are alter egos. IBA/NHA Mot.
9 at 7-11; IBA/NHA Reply at 1-4.

10 1. Subject Matter Jurisdiction

11 IBA and NHA challenge the following portions of Plaintiff's
12 TCPA claims: those based on the call Plaintiff alleges he
13 received prior to July 6, 2020, see FAC ¶ 46 (describing June
14 16, 2020 phone call), and those based on calls received by the
15 putative class prior to July 6, 2020, see id. ¶ 87. Defendants
16 argue the Court lacks subject matter jurisdiction over these
17 portions of Plaintiff's claims following the Supreme Court's
18 decision in Barr v. American Ass'n of Political Consultants, 140
19 S.Ct. 2335 (2020) (hereinafter "AAPC"). IBA/NHA Mot. at 3-7.

20 In AAPC, the Supreme Court addressed the constitutionality
21 of the TCPA. See 140 S.Ct. 2335. In a fractured decision, six
22 Justices agreed that, in adding the government-debt exception to
23 the TCPA in 2015, Congress had "impermissibly favored debt-
24 collection speech over political and other speech in violation
25 of the First Amendment." Id. at 2343. Seven Justices agreed
26 that the proper remedy for this constitutional infirmity was to
27 invalidate and sever the government debt exception thereby
28 leaving the rest of the TCPA intact. Id.

1 In light of the fractured decision, the parties here argue
2 about the sweep of AAPC. Plaintiff insists AAPC invalidated
3 only the TCPA's government-debt exception. IBA/NHA Opp'n at 1,
4 3-8. Defendants contend AAPC invalidated the entire TCPA as
5 applied to pre-July 6, 2020 conduct; and for this reason, they
6 claim, the portions of Plaintiff's claim concerning conduct
7 prior to July 6, 2020 are not justiciable. IBA/NHA Mot. at 4-7.
8 In support of their position, Defendants cite to the following
9 post-AAPC decisions: Creasy v. Charter Commc'ns, Inc., No. 20-
10 cv-1199, 2020 WL 5761117 (E.D. La. Sept. 28, 2020), Hussain v.
11 Sullivan Buick-Cadillac-GMC Truck, Inc.², No. 5:20-cv-38-Oc-
12 30PRL, 2020 WL 7346536 (M.D. Fla. Dec. 11, 2020), and Lindenbaum
13 v. Realgy, LLC, No., 1:19-cv-2862, 2020 WL 6361915 (N.D. Ohio
14 Oct. 29, 2020). These out-of-circuit, non-binding decisions
15 held that AAPC divests federal courts of jurisdiction over TCPA
16 claims concerning robocalls made before the date of AAPC's
17 issuance even when those robocalls were not made for the
18 purposes of collecting government debt.

19 However, district courts in the Ninth Circuit that have
20 addressed this issue have consistently held the opposite, finding
21 the TCPA remains enforceable against non-government debt
22

23 ²As Defendants acknowledge in their reply brief, see IBA/NHA
24 Reply at 5, the Hussain Court has since disavowed its reasoning
25 and decision in that case, stating in a subsequent decision: "the
26 Court departs from its earlier opinion because, since the Court's
27 Order in Hussain, every court faced with this same issue has
28 concluded that a plaintiff may continue to bring § 227(b) claims
post-AAPC. The Court, having the benefit now of reading all of
these cases, agrees with this majority view." Boisvert v.
Carnival Corp., No. 8:20-cv-2076-30, 2021 U.S. Dist. LEXIS 47397,
at *4 (M.D. Fla. Mar. 12, 2021).

1 collectors as to the calls made before AAAPC's issuance on July
2 6, 2020. See e.g. Stoutt v. Travis Credit Union, No. 2:20-cv-
3 01280-WBS, 2021 WL 99636 (E.D. Cal. Jan. 12, 2021); Johansen v.
4 LoanDepot.com LLC, No. 8:20-cv-00919-DOC, 2021 U.S. Dist. LEXIS
5 19562 (C.D. Cal. Jan. 31, 2021); McCurley v. Royal Sea Cruises,
6 Inc., No. 17-cv-00986-BAS, 2021 U.S. Dist. LEXIS 16403 (S.D. Cal.
7 Jan. 28, 2021); Trujillo v. Free Energy Sav. Co., LLC, No. 5:19-
8 cv-02072-MCS-SP, 2020 U.S. Dist. LEXIS 239730 (C.D. Cal. Dec. 21,
9 2020); Shen v. Tricolor Cal. Auto Grp., LLC, No. 20-cv-7419 PA,
10 2020 U.S. Dist. LEXIS 237582 (C.D. Cal. Dec. 17, 2020).

11 Recently, another court in the Eastern District considered the
12 same issue and concluded: "Because the Supreme Court has
13 invalidated and severed the government-debt exception from the
14 remainder of [the TCPA], the exception did not affect the
15 remainder of the statute and the statute remains enforceable, at
16 least against non-government debt collectors, as to calls made
17 between November 2015 and July 6, 2020." Stoutt, 2021 WL 99636
18 at *5.

19 This Court agrees with the analysis in Stoutt and finds it
20 may adjudicate all portions of Plaintiff's TCPA claims, including
21 those concerning calls placed prior to July 6, 2020.
22 Accordingly, IBA and NHA's request to dismiss the portions of
23 Plaintiff's claims concerning pre-AAAPC conduct is denied.

24 2. Alter-ego

25 IBA and NHA next argue Plaintiff has not plausibly alleged
26 IBA and NHA are alter egos. IBA/NHA Mot. at 7-11; IBA/NHA Reply
27 at 1-4. As such, they ask the Court to dismiss Plaintiff's
28 claims against NHA. IBA/NHA Mot. at 1. In opposition,

1 Plaintiff contends he has sufficiently alleged that IBA and NHA
2 are alter egos and therefore NHA may be held liable for IBA's
3 TCPA violative calls. IBA/NHA Opp'n at 8-10.

4 To state a claim that one corporation is the alter ego of
5 another, a plaintiff must plausibly allege that: "(1) that there
6 is such unity of interest and ownership that the separate
7 personalities of the two entities no longer exist and (2) that
8 failure to disregard their separate identities would result in
9 fraud or injustice." Ranza v. Nike, Inc., 793 F.3d 1059, 1073
10 (9th Cir. 2015) (internal citations and quotation marks omitted).
11 "Disregarding the corporate entity is recognized as an extreme
12 remedy, and [c]ourts will pierce the corporate veil only in
13 exceptional circumstances." Calvert v. Huckins, 875 F.Supp.674,
14 678 (E.D. Cal. 1995); see also Katzir's Floor & Home Design, Inc.
15 v. M-MLS.com., 394 F.3d 1143, 1149 (9th Cir. 2004) (explaining
16 "the mere fact of sole ownership and control does not eviscerate
17 the separate corporate identity that is the foundation of
18 corporate law.")

19 As to its alter ego theory, Plaintiff alleges the following:
20 IBA and NHA are two distinct legal entities; each is "a Florida
21 registered company headquartered in Ft. Lauderdale, Florida."
22 FAC ¶¶ 2-3. IBA and NHA are owned and operated by the same
23 management. Id. ¶¶ 23, 25. IBA and NHA are located in the same
24 office at the same suite number. Id. ¶ 24. Plaintiff received
25 unsolicited telephone calls to his cell phone over the course of
26 two and a half months, id. ¶¶ 42-86, including calls accompanied
27 by pre-recorded voicemails stating it was an IBA agent calling,
28 id. ¶¶ 55, 59 (describing voicemails stating "this is Nicole with

1 Interstate Brokers."). Though IBA's name is used in the pre-
2 recorded messages, when consumers speak with a live agent, the
3 agent may provide NHA's phone number as the call back number.
4 Id. ¶ 28. Additionally, follow-up emails regarding the insurance
5 services promoted during calls made in the name of IBA may
6 provide NHA's phone number as the call back number. Id. ¶ 68.
7 According to Plaintiff, "NHA and Interstate Brokers are one and
8 the same, working for and representing each company
9 interchangeably." Id. ¶ 26.

10 Defendant argues these allegations are insufficient under
11 both prongs of the alter ego test. The Court agrees.

12 As to the first "unity of interest and ownership" prong,
13 Plaintiff's allegations do not allow the Court to infer NHA
14 controls IBA "to such a degree as to render the latter the mere
15 instrumentality of the former." See Ranza, 793 F.3d at 1073
16 (explaining that the unity of interest prong "envisions pervasive
17 control ... such as when a parent corporation dictates every
18 facet of the subsidiary's business – from broad policy decisions
19 to routine matters of day-to-day operation."). In making this
20 determination, a court may consider "the commingling of funds and
21 assets of the two entities, identical equitable ownership in the
22 two entities, use of the same offices and employees, disregard of
23 corporate formalities, identical directors and officers, and use
24 of one as a mere shell or conduit for the affairs of the other."
25 Langley v. Guiding Hands Sch., Inc., No. 2:20-cv-00635-TLN, 2021
26 WL 978950, at *5 (E.D. Cal. Mar. 16, 2021) (internal citations
27 omitted).

28 Here even taking as true Plaintiff's allegations that IBA

1 and NHA are owned and operated by the same management, that they
2 share office space, and that IBA agents may provide NHA's phone
3 number as the callback number, the Court does not find these
4 allegations plausibly suggest NHA exercised "pervasive control"
5 over IBA. His conclusory assertion to that effect, see FAC ¶ 26,
6 is insufficient. See *Iqbal*, 556 U.S. at 679.

7 In opposition, Plaintiff argues that he has alleged more
8 than what plaintiffs in Ranza and Naiman had - the cases
9 Defendants rely on to argue Plaintiff's alter ego theory is
10 improperly pled. Opp'n at 9. But even if Plaintiff has alleged
11 more than what the Ranza and Naiman plaintiffs did, it does not
12 necessarily follow that the allegations here are sufficient.
13 Indeed, the Court does not find Plaintiff's allegations are
14 sufficient to disregard IBA and NHA's separate legal identity; as
15 the FAC acknowledges, IBA and NHA are distinct legal entities:
16 each is a Florida registered LLC. FAC ¶¶ 2-3. It bears
17 repeating that "[d]isregarding the corporate entity is recognized
18 as an extreme remedy." Calvert, 875 F.Supp. at 678.

19 As to the second prong of the alter ego test, Plaintiff's
20 allegations also fall short. "[U]nder California law the kind of
21 inequitable result that makes alter ego liability appropriate is
22 an abuse of the corporate form, such as under-capitalization or
23 misrepresentation of the corporate form to creditors." Langley,
24 2021 WL 978950, at *5 (internal citations omitted); see also FTC
25 v. Noland, No. 20-cv-00047-PHX, 2021 WL 289659 at *4 (D. Ariz.
26 Jan. 28, 2021) (explaining "a plaintiff must plead with
27 specificity that fraud or injustice would result if the
28 corporation were permitted to maintain the fiction of a separate

1 identity.”)

2 The FAC itself does not expalin how failing to hold NHA
3 liable as IBA’s alter ego would result in fraud or injustice.
4 See FAC. Nevertheless, in his opposition brief, Plaintiff
5 contends “failure to disregard the confusing corporate structure
6 involving NHA and IBA would result in fraud or injustice because
7 the structure is designed, at least in part, to obfuscate and
8 limit liability and exposure for TCPA violations.” Opp’n at 8-9
9 (citing to FAC ¶¶ 57, 61-68). Plaintiff has not alleged any
10 facts, however, to support this bald contention. There’s no
11 allegation, for example, that IBA is undercapitalized, committed
12 fraud, or exists for any other improper purpose, such as to avoid
13 liability. See Langley, 2021 WL 978950, at *5 (explaining that
14 California courts invoke alter ego liability “when the corporate
15 form is used to perpetrate a fraud, circumvent a statute, or
16 accomplish some other wrongful or inequitable purpose.”). In the
17 absence of any such allegations, Plaintiff fails to plausibly
18 allege that fraud or injustice would result.

19 Because Plaintiff has not plausibly alleged IBA and NHA are
20 alter egos, Plaintiffs’ claims against NHA are dismissed. The Court
21 also finds amendment would be futile and, therefore, Plaintiff is
22 denied leave to amend its claims against NHA. See Deveraturda,
23 454 F.3d at 1046. In opposition, Plaintiff had the opportunity to
24 proffer any additional facts that might convince the Court he could
25 plausibly allege IBA and NHA are alter egos. See Opp’n. He failed
26 to do so. Additionally, Plaintiff has already amended his
27 complaint. See FAC. He is not entitled to another opportunity to
28 properly plead his claims against NHA.

1 III. ORDER

2 For the reasons set forth above, the Court GRANTS FCL and
3 SITA's Motion to Dismiss and DENIES IN PART and GRANTS IN PART
4 IBA and NHA's Motion to Dismiss. Plaintiff's claims against FCL,
5 SITA and NHA are DISMISSED WITH PREJUDICE.

6 IT IS SO ORDERED.

7 Dated: June 21, 2021

8 
9 JOHN A. MENDEZ,
10 UNITED STATES DISTRICT JUDGE
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